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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

LOUIS W. SULLIVAN, Secretary of Health and Human Services,

Petitioner

v.

BRIAN ZEBLEY, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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INTEREST OF AMICUS CURIAE NOSSCR

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a non-profit corporation. While most of our members are attorneys in private practice, others work in programs which provide free legal services to the poor. Our members regularly represent people claiming disability benefits in administrative proceedings before the Social Security Administration of the U.S. Department of Health and Human Services (DHHS). Our members also file actions in federal court against the Secretary of DHHS ("the Secretary") appealing the final administrative denial of

clients' claims for such benefits. These disability benefits have been provided by the Congress through two separate but interrelated programs: Social Security Disability Insurance Benefits under Title II of the Social Security Act and Supplemental Security Income (SSI) under Title XVI of the Social Security Act. This case involves a special sub-group of claimants for SSI: indigent, disabled children.

Unfortunately the complexities of the qualifications for SSI, the labyrinthine nature of the administrative proceedings, and the frequent intransigence of DHHS—all of which are vividly demonstrated in this case—virtually require legal representation for these children. Moreover, the parents of these claimants, themselves indigent, are often ill-equipped from many standpoints to pursue their children's claims or even to aid their legal representatives in a meaningful way.

This brief is filed in a representational capacity on behalf of these special clients who, by virtue of their minority, indigency and disability, cannot speak for themselves. Our purpose is to draw to this Court's attention our nationwide experience that, notwithstanding its protestations, DHHS does not grant SSI benefits to indigent children suffering from impairments of "comparable severity" to those of adults who are granted benefits, despite the clear statutory mandate that SSI benefits be granted to such children. Further, this result is compelled by the regulations before the Court which, on their face, violate the Social Security Act.

SUMMARY OF ARGUMENT

Although the Congress has mandated that the Department of Health and Human Services grant Supplemental Security Income to impoverished children with impairments of comparable severity to those of adults granted benefits, the Secretary of DHHS has adopted regulations which compel a contrary result in many

instances. The child who is denied SSI often suffers the further adverse consequence of ineligibility for Medical Assistance even if such assistance would ameliorate the disabling condition.

At issue before the Court are the Secretary's SSI regulations which require that a child's impairment meet or equal one in the "Listing of Impairments," although adults need not meet such a requirement to be eligible. By comparison, an adult whose impairments do not meet or equal a Listing may be eligible for SSI if that adult's residual functional capacity is so limited that the individual is disabled. Indeed, some twenty-five per cent (25%) of all adults initially determined to be disabled by the Secretary are granted benefits on this basis without meeting or equaling a Listing.

Contrary to the Secretary's representations to this Court, the more stringent standards applied to children necessarily result in denial of benefits in comparable cases. Although some specific children's Listings do take functional consequences into account, unless a child's impairments meet or equal a Listing, the Secretary mandates that residual functional capacity be ignored and benefits be denied. Truncating the analysis of claims for child's SSI at the stage of meeting or equaling a Listing also denies to children the application of beneficial doctrines applied in adult cases such as the evaluation of disabling effects of pain and the "treating physician rule."

Disabled children are not treated comparably to adults with comparable impairments. This is best illustrated by those cases in which the Secretary denies SSI to disabled individuals when they are children and then grants them SSI as of their eighteenth (18th) birthday with no change whatsoever in the severity of their impairments. Because the Secretary's administrative procedures often drag out over the course of years, it is not unusual for NOSSCR members to represent children who become adults while their SSI claims are

pending. In many of these cases the Secretary grants SSI benefits effective the day of the claimant's eighteenth (18th) birthday. NOSSCR sets forth to this Court three examples of this arbitrary result of the challenged regulatory scheme. Younger children likewise suffer from the Secretary's illegally stricter treatment of them.

There is no justification for the Secretary's disparate treatment of children. Ignoring overall functional limitations of children who do not meet or equal a Listing necessarily results in the denial of claims which would be granted if the disabled individual were an adult. The Listings are not, and cannot be, comprehensive. They cannot determine the functional impact on all children of all disabling impairments. The Secretary argues that because children do not normally work, he cannot measure their functional capacity against any benchmark. Yet he acknowledges elsewhere that for children, disability is the impact of impairments on physical, mental and emotional growth and development. He is not, as he suggests, unable to make this determination for children on an individual basis. Indeed in one of the cases NOSSCR cites to this Court, that of Leon Gable, the Secretary determined a child to be functionally disabled at age thirteen (13), but because he found that child not to meet or equal a Listing, he refused to pay the child SSI.

It is no answer to suggest, as the Secretary does, that the courts should fill in any gaps in the Listings on an ad hoc basis on judicial review, by judicially constructing new and better Listings. To effectuate the statutory mandate that children be treated in a manner comparable to adults, the Secretary must be ordered to use comparable methodology in children's cases as in adults' cases. Otherwise indigent and disabled children will continue to be denied the SSI benefits created and intended for them by Congress.

ARGUMENT

I. THE SECRETARY'S SSI REGULATIONS RESULT IN THE DENIAL OF SSI TO MANY DISABLED CHILDREN WITH IMPAIRMENTS OF COMPARABLE SEVERITY TO THOSE OF ADULTS GRANTED SSI.

The nationwide experience of NOSSCR's membership demonstrates that the Secretary's regulatory interpretation of the children's Supplemental Security Income (SSI) Program is arbitrary, capricious and manifestly contrary to the enabling statute. In October 1972, Congress enacted Title XVI of the Social Security Act "establishing a national program to provide supplemental income to individuals who . . . are disabled . . . and are determined . . . to be eligible on the basis of . . . income and resources." P.L. 92-603, §§ 1601, 1602, 42 U.S.C. §§ 1381, 1381a. The SSI program specifically covers needy disabled children as well as adults:

> An individual shall be considered to be disabled for purposes of this title . . . if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of nor less than twelve months *(or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).* (Emphasis added).

P.L. 92-603, § 1614(a) (3) (A), 42 U.S.C. § 1382c(a) (3) (A). The grant of SSI benefits to a needy disabled person in not only important for the limited federal monetary assistance[1] provided (currently $368.00/month maxi-

1. States may provide a supplement to the federal payment. For example, Pennsylvania currently adds $32.40 per month for a combined maximum total of $400.40 per month. In some cases state supplements are mandatory; in other cases they are optional.

mum for an individual assuming no deductions for actual or deemed income),[2] but also because receipt of SSI normally makes an individual eligible for Medical Assistance (Medicaid) under Title XIX of the Social Security Act. 42 U.S.C. § 1396(a) (10)(A) (i). In many instances this Medical Assistance is even more valuable to the claimant than the cash assistance because it provides access to essential medical care. Denial of Supplemental Security Income may well cause denial of medical care needed to ameliorate a disabling condition.[3]

Under the Secretary's regulations, a disabled child can receive SSI benefits only if he or she has a medically determinable physical or mental impairment which is listed in the "Listing of Impairments," 20 C.F.R., Part 404, Subpart P, Appendix 1, or which is determined by DHHS to "medically equal" an impairment included in this Listing. 20 C.F.R. § 416.924. By comparison, an adult SSI applicant whose condition is not found to meet or equal one of those set forth in the Listings is *not* disqualified from benefits. Rather DHHS will go on to determine his or her overall residual *functional* capacity. This determination of residual functional capacity "is a medical assessment" of physical abilities, mental impairments and other impairments such as skin impairments, epilepsy, disorders of vision or hearing, manipulative

NOTES *(Continued)*
See 20 C.F.R. § 416.2001.

2. There are complicated rules by which part of the parents' income is "deemed" to be a child's, resulting in a reduction or loss of SSI benefits. *See* 20 C.F.R. §§ 416.1147, 416.1148, 416.1165, 416.1851. Hence SSI is only available to a disabled child whose family is indigent.

3. Indeed, it has been held that SSI is not available to an indigent child with pancreatic cystic fibrosis even though he needs federal benefits for preventative medication and treatment, where he does not meet the Secretary's regulations challenged here. *Burnside on behalf of Burnside v. Bowen*, 845 F.2d 587, 592 (5th Cir. 1988).

limitations, etc. 20 C.F.R. § 416.945(a). Then DHHS determines whether the adult claimant is disabled based upon that residual functional capacity, as well as age, education and work experience. 20 C.F.R. §§ 416.920, 416.945.

By contrast, DHHS makes no such assessment of the residual functional capacity of a child – and its disabling impact on the child – where DHHS finds that the child does not have a condition which meets or is "medically equal" to a Listing in the Listing of Impairments. The significance of terminating the analysis of children's disability claims at the stage of meeting or equaling the Listings is amply demonstrated by the Secretary's statistics for assessment of adult claims. Every year for the last five years, roughly 25% of all adults initially granted disability benefits did not meet or equal a Listing.[4] These adults were granted benefits based upon the disabling impact of their residual functional capacity. No such assessment is made for children.

Moreover, the Secretary's definition of "medically equal" specifically excludes consideration of overall functional capacity:

> As in determining whether the listing is met, it is incorrect to consider whether the listing is equaled on the basis of an assessment of *overall* functional impairment. The level of severity in any particular listing section is depicted by the given set of findings and not by the degree of severity of any single medical finding—no matter to what extent that finding may exceed the listed value.
>
> The mere accumulation of a number of impairments also will not establish medical equivalence. When an individual suffers from a combination of

4. Appendix A to this brief is a Table provided by the Secretary to the Congress setting forth this data.

> unrelated impairments, the medical findings of the combined impairments will be compared to the findings of the listed impairment most similar to the individual's most severe impairment. The functional consequences of the impairments (i.e, RFC), irrespective of their nature of extent, cannot justify a determination of equivalence. (Emphasis in original).

Social Security Ruling 83-19. Joint Appendix 236, 239-240.

The Secretary argues that:

> Nor can it credibly be maintained that the Secretary's regulations are arbitrary and capricious. The criteria is the special Part B Listing for children in fact do take into account functional and developmental consequences of impairments and their impact on ability to do age-appropriate activities where those factors are germane to particular impairments. In other words, the considerations that respondents would require the Secretary to consider on an individualized basis were taken into account in the formulation of the Part B Listing in the first place. As a result, the criteria in the Listing *already* embody the level of impairment severity that, in the Secretary's judgment, has an impact on development in a child comparable to the impact of an impairment on an adult's ability to work. (Emphasis in original).

Brief for the Petitioner, p. 18. This is extremely misleading. It begs the question. Of course the Listings occasionally mention the functional consequences of impairments. But if an adult's impairments do not meet or equal one of the Listings, the Secretary then assesses his overall residual functional capacity. For a child this assessment is precluded by the Secretary's own interpretation quoted above.

Furthermore, the courts have imposed upon the Secretary the duty in adult SSI cases to consider a variety of factors not addressed by the Listing of Impairments. Two examples are the evaluation of disabling effects of pain and the "treating physician's rule." Section 223(d)(5)(A) of the Social Security Act provides, in relevant part:

> An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability.[5]

42 U.S.C. § 423 (d) (5) (A). Nevertheless, the Adult Listings do not treat pain in any comprehensive manner,[6] and the Childhood Listings do not specifically

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5. This statutory provision is made applicable to SSI claims by 42 U.S.C. § 1382c(a) (3) (G).

6. Sections 1.05C and 7.16A of the Listings of Impairments for adults contain pain as one elemen. of each Listing. There is nothing comparable in the parallel Listing of Impairments for children.

address pain at all. In order to fill this gap for adults, the courts have superimposed various rules regarding the evaluation of pain to effect this statutory mandate. The precedent in the Third Circuit is illustrative, requiring:

> . . . (1) that subjective complaints of pain be seriously considered, even where not fully confirmed by objective medical evidence, *Smith v. Califano*, 637 F.2d 968, 972 (3d Cir. 1981); *Bittel v. Richardson*, 441 F.2d 1193, 1995 (3d Cir. 1971); (2) that subjective pain "may support a claim for disability benefits," *Bittel*, 441 F.2d at 1195, and "may be disabling," *Smith*, 637 F.2d at 972; (3) that when such complaints are supported by medical evidence, they should be given great weight, *Taybron v. Harris*, 667 F.2d 412, 415 n.6 (3d Cir. 1981); and finally (4) that where a claimant's testimony as to pain is reasonably supported by medical evidence, the ALJ may not discount claimant's pain without contrary medical evidence. *Green v. Schweiker*, 749 F.2d 1066, 1070 (3d Cir. 1984); *Smith*, 637 F.2d at 972.

Ferguson v. Schweiker, 765 F.2d 31,37 (3rd Cir. 1985).[7] No comparable rules can be applied in claims for SSI for children because under the Secretary's challenged regulations disabling pain is simply not relevant.

Likewise, in adult disability claims, the courts have long enunciated the "treating physician rule" to the effect that:

> . . . the expert opinion of a claimant's treating physician regarding his "medical disability, i.e. diagnosis and nature and degree of impairment, is . . .

NOTES *(Continued)*

Compare Part A and Part B of 20 C.F.R. Part 404, Subpart P, Appendix 1, set forth in the Joint Appendix pp. 115-235.

7. *Accord Polaski v. Heckler*, 751 F.2d 943, 948-950 (8th Cir. 1984); *Foster v. Heckler*, 780 F.2d 1125, 1129 (4th Cir. 1986).

> binding on the fact-finder unless controverted by substantial evidence." *Schisler v. Heckler*, 787 F.2d 76, 81 (2d Cir. 1986).

Hidalgo v. Bowen, 822 F.2d 294, 296-7 (2nd Cir. 1987).[8]

The circuit courts have further adopted a "corollary" to the treating physician's rule, as follows:

> A corollary to the treating physician rule is that the opinion of a non-examining doctor by itself cannot constitute the contrary substantial evidence required to override the treating physician's diagnosis. *See Havas*, 804 F.2d at 786; *Strickland v. Harris*, 615 F.2d 1103, 1109 (5th Cir. 1980); *Martin v. Secretary of Health, Education and Welfare*, 492 F.2d 905, 907-08 (4th Cir. 1974); *Landess v. Weinberger*, 490 F.2d 1187, 1190 (8th Cir. 1974); *Meffort v. Gardner*, 383 F.2d 748, 759 (6th Cir. 1967).

Id. at 297. Largely because the Secretary's analysis of SSI claims for children ends with the issue of whether a child meets or equals a Listing, the Secretary applies the converse of the "treating physician rule" in children's cases. 20 C.F.R. §416.926. As clearly set forth in Social Security Ruling 83-19:

> Decisions of equivalence are the responsibility of a physician designated by the Secretary. In most instances, the designated physician is a physician in the State agency. A medical advisor at a hearing or a member of the Appeals Council's (AC) medical support staff (including medical consultants) may also make the physician's decision in the determination of medical equivalence.
>
> As with any other medical opinion concerning impairment severity for titles II and XVI disability

8. *Accord Gilliland v. Heckler*, 786 F.2d 178, 184 (3rd Cir. 1986); *MacGregor v. Bowen*, 786 F.2d 1050, 1053 (11th Cir. 1986).

> purposes, judgments of the examining physician are not controlling on the issue of equivalence. In every instance, the decision as to equivalence is to be made by a program physician based upon the individual medical findings in the particular case.

Joint Appendix at 240. Hence for children seeking SSI, the opinion of a non-examining physician on the ultimate issue of medical equivalence takes precedence over those of treating physicians, thereby turning the "treating physician rule" on its head.

II. MANY DISABLED INDIVIDUALS ARE DENIED SSI AS CHILDREN AND THEN GRANTED SSI AS ADULTS ON THEIR EIGHTEENTH BIRTHDAY WITH NO CHANGE IN THEIR IMPAIRMENTS.

In our practices, NOSSCR members repeatedly see that the inevitable effect of the Secretary's challenged regulation is to deny indigent disabled children SSI—and often therefore Medical Assistance—although their disabilities are of "comparable severity" to those of adults who would be granted benefits. This can best be seen in those cases in which a child turns eighteen (18) years old during the course of the notoriously lengthy administrative proceedings.[9] It is not unusual for the Secretary to deny a child SSI disability benefits prior to her eighteenth (18th) birthday, but to award them as of that date. Because the child starts receiving monthly benefits and because this result is often mandated by the Secretary's challenged regulation, it is understandable that very few of these cases are appealed to court.

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9. "The Secretary correctly points out that Congress repeatedly has been made aware of the long delays associated with resolution of disputed disability claims and repeatedly has considered and expressly rejected suggestions that mandatory deadlines be imposed to cure that problem." *Heckler v. Day*, 467 U.S. 104, 111 (1984).

A. Lisa Wills

One of the few reported court decisions involving this scenario is that of Lisa Wills. In *Wills v. Secretary of Health and Human Services,* the district court stated that the issue presented was whether Lisa Wills, then nineteen (19) years of age, suffered from problems which "were sufficiently disabling to entitle Lisa to SSI before her eighteenth birthday." 686 F. Supp. 171, 172 (W.D. Mich. 1987). The court noted that:

> Lisa became eighteen during the administrative pendency of her SSI application. She was awarded benefits as an adult commencing on her birthday. That decision is not before the court.

Id. at 172, n.1. One unfamiliar with the Secretary's regulations might wonder what had befallen Lisa on her eighteenth birthday to render her condition so disabling as to be recognized as such by the Secretary. The simple answer is that all that befell Lisa was her eighteenth birthday and the application of the more flexible adult SSI regulations. In fact Lisa had suffered since infancy from a rare genetic enzyme defect which had caused mild retardation and central nervous system defect contributing to learning and behavioral difficulties. *Id.* at 172.

Lisa Wills was fortunate in that the reviewing court found that there was no substantial evidence to support the Secretary's finding that she did not meet a Listing as a child. The court therefore reversed the Secretary's final administrative decision denying her benefits. *Id.* at 176. Nevertheless her case demonstrates that, as the Secretary interprets and enforces his regulations, a child who is denied children's SSI may have the exact impairments which cause the Secretary to grant her adult SSI when she reaches the age of eighteen (18).

Lisa Wills' case is not an isolated example. Again and again we see similar situations of disabled children denied SSI benefits until their eighteenth birthday

(thereby frustrating the very purpose of the SSI children's program) and then granted SSI benefits as of their eighteenth birthday with no change in their impairments. Even for the few comparatively fortunate children like Lisa Wilis who ultimately prevail in federal court, the Secretary's inflexible and arbitrary regulations mean the denial of SSI benefits during the critical period that they were intended to be received and often the consequent denial of Medical Assistance during that period.

B. Steven Martinez

Many disabled individuals and their families give up along the way, frustrated by the Secretary's seemingly interminable procedures and stymied by the double standard which the Secretary denies to this Court that he applies. The case of Steven D. Martinez exemplifies the Secretary's actual practice.[10] Steven's mother filed an application for children's SSI benefits for Steven in early May 1985 alleging that he was disabled. Steven was then seventeen (17) years old. He suffered from severe bilateral sensorineural hearing loss and congenital abnormality of the right hand with severe loss of grip strength and absence of the right thumb and fourth and fifth fingers. In addition, he had received a penetrating injury to his rectum and bladder which necessitated surgery and a temporary colostomy. Steven's claim was denied initially and on reconsideration, and his mother requested a hearing before an administrative law judge. In June 1986, over thirteen (13) months after Steven's mother filed his claim, the administrative law judge issued a decision denying it.

On appeal, the Secretary acting through the Appeals Council remanded the case "for additional evaluation because the claimant had attained age eighteen (18) before the date of the decision." In October 1987, almost

10. Appendix B to this brief is a reproduced copy of the final "Favorable" decision in the Steven D. Martinez case.

two and a half years after the initial filing, Steven's claim was again denied by an administrative law judge. On appeal, the Secretary again remanded the case. A supplemental hearing was held in late October 1988, some three and a half years into the process. That hearing resulted in a final "favorable" decision on December 27, 1988.

The "favorable" decision in Steven Martinez' case again illustrates the illegality of 20 C.F.R. § 416.924. This final decision finds Steven to be disabled and eligible for SSI as of April 15, 1986, the day he turned eighteen (18), but not before.[11] No intervening injury or illness struck Steven on April 15, 1986. His impairments of April 15, 1986, were clearly of "comparable severity" to those he suffered in 1985 when he applied. Indeed if anything, his condition had improved by 1986 because he had had a longer recovery time since his temporary colostomy. When the Secretary's administrative law judge considered primarily the impact of his long-term hearing loss and congenital hand deformity, he appropriately found Steven's residual functional capacity to be so diminished that he was disabled as an adult. However, since none of Steven's impairments met a Listing, 20 C.F.R. § 416.924 barred him from receiving SSI as a child.

C. Leon Gable

Leon Gable was born on November 28, 1969, and suffers from defective intellectual development, the side effects of seizure medication (sluggishness, blurred vision and uncontrolled bowel movements), limited social ability and impaired ability to deal with stress. In December 1986, his mother filed an application for child's SSI benefits on his behalf. In July 1987, his mother also filed an application for "disabled adult child's" benefits

11. Steven took no further appeal of this partially favorable decision rendered over three and a half years after his application for benefits.

for Leon under Title II of the Social Security Act.[12] Both claims were denied initially and on reconsideration. Leon's mother sought and obtained a hearing before a Social Security administrative law judge. Almost two years after the child's SSI claim was filed, the ALJ issued a decision denying that claim, pursuant to 20 C.F.R. §416.924, finding that, "the evidence fails to establish conclusively a history of impaired intellectual functioning below that (I.Q. of 69 or less) prescribed by the Listings."[13]

However, with regard to Leon's claim for disabled adult child's benefits under Title II of the Social Security Act, the ALJ reached a different result, because only claimants for childhood SSI benefits are required to meet or equal a Listing. The ALJ considered the testimony of a "vocational expert" who had appeared at the hearing. This vocational expert testified that Leon was adversely affected by limited social awareness, limited social ability, poor ability to deal with stress, a history of seizures and impaired intellectual capacity. The vocational expert opined that an individual with Leon's combination of impairments was unlikely to function in any job. Using the standard for a disabled adult child, in which residual functional capacity is assessed, the ALJ found Leon to be under a disability since Sept. 1, 1983 (when he was 13 years of age). This entitled him to disabled adult child benefits after age 18, but not to SSI benefits as a child!

12. Ordinarily the child of a wage earner, who is entitled to old age or disability benefits or who has died, may receive benefits on that parent's account only until age 18. 20 C.F.R. §404.350. However, such a child may continue to receive Title II Social Security benefits on the parent's account past age 18, if the child has a disability that began before age 22. *Id.* This is a "disabled adult child."

13. Appendix C to this brief is the administrative law judge's decision of November 28, 1988, in the Leon Gable case.

On administrative appeal, the Secretary, acting through the Appeals Council, affirmed the decision of the administrative law judge, stating that he had correctly applied the law.[14]

NOSSCR could multiply examples from around the country of children who have been denied SSI benefits by the Secretary until the date of their eighteenth (18) birthday and granted benefits as of that birthday with no change in the severity of their impairments. However, we do not mean to suggest that 20 C.F.R. § 416.924 is illegal only with regard to this subgroup of children's SSI claimants who turn eighteen (18) during the Secretary's extended administrative processes. It is also illegally applied to young children who are denied children's SSI benefits who, we are confident, would have to be awarded benefits if their residual functional capacity were assessed in a manner comparable to that assessment for adult claimants. We specifically bring to this Court's attention the arbitrary and irrational results in the cases of children turning eighteen (18) because of the Secretary's own recognition of their disparate, non-comparable treatment, and not in any way to sanction the Secretary's illegal treatment of younger claimants.

III. THE REASONS ASSERTED BY THE SECRETARY FOR HIS DISPARATE TREATMENT OF DISABLED CHILDREN ARE NEITHER LAWFUL NOR RATIONAL NOR MANDATED BY PRAGMATIC CONCERNS.

The Secretary argues that "the concept of comparability does not rigidly require uniformity insofar as the subjects to be compared 'are different in a fundamental way.' " Brief for the Petitioner, p. 24. But surely the

14. Appendix D to this brief constitutes the Appeals Council's decision in the Leon Gable's case. Counsel of Record is advised that Leon Gable's attorney intends to file an appeal of the Secretary's decision to federal court.

statutory grant of benefits to children with impairments of comparable severity requires like results where there are identical impairments as in the cases cited above. Denial of childhood benefits in situations of comparable severity is the very essence of a regulatory framework that is arbitrary, capricious and manifestly contrary to the statute. *Atkins v. Rivera,* 477 U.S. 154, 162 (1986).

The Secretary further argues that the combined effect of multiple impairments is considered throughout the disability determination process. Brief for the Petitioner, p. 28, n.19. However, for children this process only extends to the determination of whether or not they have a severe impairment that meets or equals a specific listing. By the Secretary's edict, these combined effects will only be "compared to the findings of the listed impairment most similar to the individual's most severe impairment. The functional consequences of the impairments (i.e., RFC), irrespective of their nature or extent, cannot justify a determination of equivalence." SSR 83-19, Joint Appendix, p. 240. Hence, by the Secretary's regulations, Steven Martinez' functional limitations did not render him disabled for SSI purposes until he turned eighteen (18), then rendered him disabled.

Of course no listing of afflictions can ever be comprehensive, nor do all impairments necessarily impact all individuals in the same way. Indeed, as the Listings have been promulgated and revised, the Secretary previously acknowledged that they were not comprehensive and were not intended to preclude assessment of functional limitations in those cases where the Listings were not equaled or met. *See Marcus v. Bowen,* 696 F. Supp. 364, 373-376 (N.D. Ill. 1988).

The Secretary asserts:

> The regulations focus, however, not on the individual child's ability to function as such, but on the impact of the impairment on his physical, mental, and emotional growth and development. An assessment of functional abilities will normally be subsumed in applying these standards.

Brief for the Petitioner, p. 42. This self-contradictory language obfuscates rather than clarifies. If disability is not the impairment of function of an individual, what is it? In some cases, the child's impairment of physical, mental and/or emotional growth will be demonstrated by the child meeting or equaling a specific Listing. But because the Listings cannot be comprehensive, and because the overall functional consequences of impairments irrespective of their nature or extent cannot justify a determination of equivalence, the Secretary's regulation violates the Social Security Act.

The Secretary goes on to argue:

> Simply put, an assessment of residual functional capacity or functional impairment cannot exist in a vacuum. The relevant question is, functional capacity to do *what*? With respect to adults, the Secretary is instructed to inquire into an individual's functional capacity to engage in "substantial gainful activity," *i.e.,* to work. Ability to work thus provides a single, objective benchmark against which a person's individual non-medical attributes—his age, education, and previous work experience—can be assessed. As the Secretary has recognized from the outset of the program, however, the assessment of disability in children "cannot properly be associated with an inability to work, since children are not ordinarily expected to engage in such activity." J.A. 90. (Emphasis in original).

Brief for the Petitioner, p. 43. This is simply disingenuous. Obviously assessment of residual functional capacity or functional impairment cannot exist in a vacuum. But there is no mystery as to against what it should be assessed. The Secretary has acknowledged that the

appropriate issue is, as already noted, "the impact of the impairment on his [the child's] physical, mental and emotional growth and development." Brief for the Petitioner, p. 42. Indeed, since filing his Brief for the Petitioner with the Court, the Secretary has published a notice of proposed rulemaking which would revise the Listings of Impairments for children under age eighteen (18) with mental disorders. Federal Register, Vol. 54, No. 155, August 14, 1989, pp. 33238 *et seq.* In the new proposed mental Listings for children, the Secretary would evaluate various functional limitations "which are applicable to children," such as "motor development, cognitive/communicative function, and social function" and "function in the school setting." *Id.* at 33242.[15] For the severely impaired child who does not meet or equal a Listing, an assessment of limitation of function in these areas is essential to determine whether that child has impairments of comparable severity to those of adults who would be granted benefits.

As the Leon Gable case exemplifies, the Secretary can apply functional criteria to children who do not meet or equal the Listings. Using this criteria, the Secretary found Leon to be disabled at age 13. The Secretary is not unable to apply comparable criteria, but rather is unwilling to award SSI benefits to comparably impaired children.

The Secretary opines:

> Moreover, as noted above, if, as respondents allege, there are any "gaps" in the Secretary's Part B Listing (Br. in Opp. 24)—that is, if experience reveals that

15. While these proposed regulations, if adopted, would certainly be an improvement over the current children's mental Listings, they would not resolve this case. The Secretary still would not assess the overall residual functional capacity of children whose mental impairments do not meet or equal a specifical mental Listing; and the new Listings would not apply to children whose impairments are primarily physical.

> the Listing overlooks certain impairments that have a severe impact on childhood growth and development, or inadequately gauges the impact of a specific impairment on childhood development—the solution is not to jettison the entire regulatory framework. Rather, as the district court observed, the proper remedy is to challenge particular Part B listings (or the absence of such listings) on judicial review of the denial of disability benefits.

Brief for the Petitioner, p. 42. Respondents are not seeking "to jettison the entire regulatory framework" and have not asked the courts to do so. Rather, because there are, and must be, gaps and inadequacies in any set of Listings, respondents ask that the Secretary be ordered to apply an assessment of residual functional capacity to children whose impairments do not meet or equal one of the Listings in a manner comparable to that assessment for adults.

The Secretary's argument regarding the challenge to particular Listings or the absence thereof is not only unrealistic, but is a complete misstatement of what the district court said. The district court never suggested that an appellant could challenge a particular Listing or absence thereof on judicial review. Rather, it stated:

> Plaintiffs' argument may well be valid, in many cases; but errors in applying the regulations in some cases do not demonstrate invalidity of the regulations themselves. Part B of the Secretary's listings of impairments, 20 C.F.R. § 416.925, is not facially invalid or incomplete, seems to provide the necessary flexibility, and, in my view, permits the award of benefits in conformity with the intent of Congress. If these criteria are being misapplied or misinterpreted, the remedy lies in the appeal process in individual cases, not in a class-action decree.

Zebley v. Heckler, 642 F. Supp. 220, 222 (E.D. Pa. 1986).

The reality is that such an attack on the adequacy or non-existence of a specific Listing would likely be precluded by the courts' limited scope of review. The standard for judicial review of the denial of individual claims is set forth in Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), which provides in relevant part:

> The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations.

Applying this test to Social Security appeals, this Court has stated that substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401 (1971). As the Secretary correctly notes, Congress has given him authority to publish such criteria as Listings. Brief for the Petitioner, p. 21. A direct attack on a specific Listing or lack thereof would implicate the courts in what the Secretary claims is implicated here: substituting their medical judgment for that of the Secretary. The Secretary points to no case in which such an attack has been mounted, much less one that has been successful. One can imagine the Secretary's reaction if, on judicial review, one were to ask a court, for

example, to rule that the standard for growth impairment under Listing 100.03A should be a drop in height of 20 percentiles rather than the current regulatory 25 percentiles. See Joint Appendix, p. 208. He would, properly, respond that such a judgment is his, not the court's, to make.

One cannot expect the courts to substitute their medical judgment for that of the Secretary. Nor is the answer to ask the courts to do so, on an individual basis, to remedy gaps and flaws in the Listings. Rather, the answer is for this Court to direct the Secretary to use comparable methodology to assess children's impairments as he does to assess adults' impairments. That is the only way to effectuate Congress' clear mandate that the Secretary grant SSI benefits to children who suffer from any medically determinable physical or mental impairment of comparable severity to that of an adult who would be granted such benefits.

CONCLUSION

Congress has clearly and specifically mandated that the Department of Health and Human Services grant SSI benefits to children who suffer from any medically determinable physical or mental impairment of comparable severity to that of an adult who would be granted such benefits. Instead the Secretary of DHHS holds children to a more restrictive standard of disability than adults, by requiring them to present an impairment that meets or equals a Listing and by ignoring impairment of their overall residual functional capacity. The necessary result of this disparate treatment is to deny SSI and Medical Assistance to many of the children whom Congress intended to benefit from these programs. The Secretary's arguments that children are treated in a comparable manner to adults ignore the inevitable results of this regulatory framework and are belied by his actions. The arbitrary and capricious results are not

mandated by any inability to perform the evaluations mandated by Congress. Real children in real need with real and serious problems suffer real harm as a result. These children will not receive the statutory benefits they desperately need unless and until this Court upholds the Third Circuit and directs the Secretary to make fully comparable assessments of the impairments of disabled children.

Respectfully submitted,

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APPENDIX

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COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS

1989 EDITION

MARCH 15, 1989

Prepared for the use of the Committee on Ways and Means by its staff

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TABLE 2.—BASIS FOR TITLE II ALLOWANCES—NATIONAL FIGURES: INITIAL WORKER DETERMINATION, FISCAL YEARS 1975-88 IN PERCENT

Fiscal Year	Meets listing	Equals listing	Medical and vocational considerations
1975	29.4	43.9	26.7
1976	29.0	45.1	25.9
1977	34.2	41.9	23.9
1978	45.6	31.9	22 5
1979	55.1	22.7	22.1
1980	57.9	16.2	25.9
1981	63.9	12.3	23.8
1982	72.7	8.6	18.7
1983	74.0	8.3	17.7
1984	66.7	8.7	24.6
1985	62.7	9.2	28.1
1986	68.2	8.7	23.1
1987	66.0	10.2	23.8
1988	64.3	11.0	24.7

Source: Office of Disability, Social Security Administration.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF: Steven D. Martinez (Claimant)

CLAIM FOR: Supplemental Security Income

OMITTED (Social Security Number)

Section 1614 of the Social Security Act, 20 CFR 416.901-416.999, and Appendices 1-2, Subpart P, Regulations No.4 (Code of Federal Regulations) provide the definition of "disability" that is being applied in this administrative decision.

The claimant in the instant case is a twenty year old man who has a tenth grade education and no past relevant work experience. His mother, Sylvia Martinez, filed an application for Title XVI supplemental security income on the claimant's behalf on May 3, 1985, and alleged therein that he had been disabled since July 1980 because of a hearing impairment and a colostomy (Exhibit 1). His claims were denied at both the initial and reconsideration levels. Dissatisfied with those determinations, the claimant filed a timely request for hearing on December 5, 1985 (Exhibit 10). This request for hearing resulted in a denial by an Administrative Law Judge on June 25, 1986 (Exhibit 21). On appeal, the Appeals Council remanded the case for additional evaluation because the claimant had attained age eighteen before the date of the decision. This remand resulted in another denial decision issued on October 26, 1987. The

case was again appealed and has currently been remanded for consideration of the period prior to the claimant's attainment of age eighteen and after the attainment of age eighteen. It was also ordered that a vocational expert provide testimony at the hearing regarding the impact of the claimant's nonexertional impairments on his ability to perform light and sedentary work. A supplemental hearing was held on October 26, 1988, in Pueblo, Colorado. The claimant appeared personally at the hearing, and was represented by Trudie Gilmore, a non-attorney representative. Present to testify as a vocational expert was Dr. Raymond Best.

ISSUES

The issue before the Administrative Law Judge is whether the claimant is disabled under section 1616(a)(3)(A) of the Social Security Act. The Act defines "disability" as the inability to engage in any substantial gainful activity by reason of medically determinable physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than twelve months or, in the case of a child under the age of eighteen, if he or she suffers an impairment of comparable severity.

EVALUATION OF THE EVIDENCE

Section 416.920 of Regulations No. 16 provides, that in assessing an individual's allegations of disability, a sequential evaluation method will be used. Current work activity, severity of impairments and vocational factors are considered in that order. However, if a determination can be made at any stage that an individual is, or is not, "disabled", evaluation under a subsequent step shall be unnecessary. Section 416.923 of the Regulations provides that a child under age eighteen is disabled if he (a) is not doing any substantial gainful activity; and (b) has

a medically determinable physical or mental impairment(s) which meets the duration requirement, is listed in Appendix 1 of Subpart P of Regulations No. 4, or is determined to be medically equal to an impairment listed.

Neither the testimony at the hearing nor the documents in the file indicate that the claimant has ever engaged in any substantial gainful activity. Therefore, a finding cannot be made at Step 1 of the Sequential Evaluation of the Evidence under Regulations 416.920(b). The undersigned must next determine whether the claimant is suffering from a severe impairment or combination of impairments which would meet or equal the requirements of the Listings of Impairments at Appendix 1 to Subpart P of Regulations No. 4.

As previously discussed, prior to the attainment of age eighteen, and in order to qualify for supplemental security income, the claimant would have to have a listing level impairment. Vocational factors, age, education, or skill level of work experience are not taken into consideration until the attainment of age eighteen. After the attainment of age eighteen, the sequential evaluation regulations apply to the evaluation of the claimant's condition; and then vocational factors are considered. The medical evidence reveals that the claimant has a significant bilateral sensorineural hearing loss documented by audiograms in May 1985, July 1985, and March 1986 (Exhibits 15, 17, 18, and 19). It was the claimant's testimony at the hearing that he wears a hearing aid, but has had difficulty finding one that works well for him. At the time of the hearing, he was anticipating trying yet another hearing aid, in hopes that he would be able to hear better. In his left ear, he has no hearing whatsoever. He described having difficulty hearing when there are many people in the room or background noise. In these situations, the claimant described that he mostly does lip reading. He has difficulty using the telephone and does not feel safe

driving for long distances. It is clear that this impairment is imposing some work-related restrictions, and therefore, would be a "severe" impairment. However, his hearing impairment is not as severe as that required by section 2.08 of the Listing of Impairments. The claimant's pure tone average loss in the better ear is 30db and the SRT is 35db which indicates that he has the potential for gain from amplification. With a hearing aid, he would have a 56 percent discrimination. Section 2.08 of the Listing of Impairments requires speech discrimination of 40 percent or less. Clearly, the claimant would have difficulty in any situation where keen hearing was required or in a noisy or public setting, or where he had to use the telephone to any extent. However, his hearing loss cannot be found to be of listing level severity either prior to or after the attainment of age eighteen, and continuing through the present.

The claimant also alleges a degree of disability secondary to a congenital abnormality of his right hand. He cannot fully use the right upper extremity and his ability to lift, carry, or manipulate is impaired. The claimant estimated that he can only lift five pounds at a time. The claimant's treating physician, Dr. Villalon reported in May 1987 that the claimant's deformity resulted in a severe loss of grip strength. The right thumb, fourth and fifth fingers are absent. Section 1.09 of the Listings of Impairments governs the evaluation of disability secondary to amputation or anatomical deformity resulting in residual limitation. However, this listing requires that the amputation be present in both hands, both feet, or one hand and one foot. Since the claimant is missing three fingers from only one hand, it is clear that this impairment is not of listing level severity. This condition has not been of listing level severity at any time prior to the date of this decision, including the period of time prior to the attainment of age eighteen.

At this most recent hearing, the claimant alleged that he experiences back pain on a daily basis, for which he takes Darvocet. He described that he takes this medication every day for back pain and that he has a great deal of difficulty standing for more than twenty minutes at a time. He could not bend more than three to four times throughout the day. The medical record is silent regarding any mention of a back impairment. The claimaint was examined by an orthopedist, Dr. Hamill, in August 1985 (Exhibit 18), mostly in connection with the deformity of his right hand. However, Dr. Hamill noted that with respect to the claimant's neck, spine, lower extremities, and left upper extremities, all findings were within normal limits. There certainly has been no indication of any radiculopathy or neurological deficits as required by Section 1.05(C) of the Listings of Impairments which governs the evaluation of disability secondary to disorders of the spine. The claimant's back impairment has never been of listing level severity, neither prior to the attainment of age eighteen, nor since.

Finally, the claimant alleges a degree of disability secondary to residual impairment following a penetrating injury to his rectum and bladder which occurred in February 1985 (Exhibits 11 and 12). The claimant underwent exploratory surgery for repair of his bladder and colon, and had a temporary colostomy until June 1985. Since then, the claimant alleges that he has continued to experience intermittent pain and discomfort in the colostomy area as well as periodic diarrhea and gas. At the most recent hearing, the claimant reported that he is not taking any regular medication for this impairment, but occasionally requires Pepto Bismol. He has not been able to seek treatment for these residual complications due to a lack of funds. He testified that he vomits once or twice a day in connection with his abdominal impairments. Since the claimant has not sought treatment for these residual symptoms, there is

no medical documentation of clinical findings which would indicate an impairment which meets or equals any of the Listings of Impairments at Section 5.01, which pertains to the digestive system. There have been no instances of obstruction, absess, fistula, or stenosis. The claimant has not experienced any severe weight loss because of this problem; on the contrary, he has gained weight and is considered to be obese. In order for the claimant's obesity to be found to be of listing level severity, at his height, he would have to weight 310 pounds. Currently, the claimant testified that he weighs 270 pounds, and it is clear that his obesity is not of listing level severity, nor was it of listing level severity prior to the attainment of age eighteen.

Since none of the claimant's impairments are of listing level severity, it cannot be found that he was disabled and entitled to supplemental security income at any time prior to the attainment of age eighteen. Regarding the period since the attainment of age eighteen, the undersigned must now proceed to determine whether the claimant retains the capacity to perform any work which exists in significant numbers in the regional or national economies. Once a claimant has established that he cannot perform his past relevant work or that he has no past relevant work, the burden shifts to the Secretary to show that there are other jobs existing in significant numbers in the national economy which he can perform, consistent with his medically determinable impairments, functional limitations, age, education, and work experience. On an exertional basis, giving the claimant the benefit of the doubt, and allowing for some significant pain and discomfort when lifting, the undersigned concludes that exertionally, the claimant would be limited to lifting no more than five pounds at a time with his right hand and twenty pounds at a time with both hands, due to the residual effects (pain, discomfort, periodic diarrhea, stomach gas, and vomiting) of his rectal and bladder injuries. Even allowing for some

discomfort in the claimant's lower back, the claimant could not be expected to lift more than twenty pounds at a time. From an exertional standpoint, the Administrative Law Judge therefore finds that the claimant retains a residual functional capacity for the performance of a wide range of at least "light" work. Light work as defined by Social Security Regulations requires lifting no more than ten pounds on a repetitive basis and twenty pounds occasionally. It requires an ability to stand and walk for up to six hours out of an eight hour day.

The ability to perform light work also includes the ability to perform sedentary work. Most unskilled sedentary jobs required good use of the hands and fingers for repetitive hand-finger actions. Furthermore, many of the jobs at these exertional levels require a keen sense of hearing. A vocational expert was present at the hearing to assess the degree of impact upon the claimant's maximum sustained work capability imposed by his nonexertional impairments. Dr. Best testified that given the claimant's hearing problems and his manipulative deficits in the right hand, that there would be a significant erosion upon the vocational base of jobs existing at the unskilled sedentary or light level.

At twenty years old, the claimant is currently considered to be a younger individual. He has a high school education and no past relevant work experience. If the claimant had the capacity to perform the full range of light work activity, his medical-vocational profile would coincide with all the factors of Rule 202.20, which directs a determination of "not disabled". However, when a claimant suffers nonexertional impairments, these rules may only be used as a framework for decision making. In this case, great weight has been accorded to the testimony of the vocational expert which indicates that the claimant's nonexertional limitations in the areas of hearing and manipulating with his right hand preclude the performance of so many jobs at the sedentary or light unskilled level, that jobs the claimant might be

able to perform would no longer exist in significant numbers in the regional or national economies. Accordingly, pursuant to 20 CFR 416.920(f), the claimant is found "disabled", as of the date he attained age eighteen, April 15, 1986, but nor prior thereto.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant has never engaged in substantial gainful activity.

2. The medical evidence establishes that the claimant suffers from sensorineural hearing loss, deformity of the right hand, status/post colostomy closure, obesity, and lower back pain.

3. The medical evidence further establishes that the claimant does not have an impairment or combination of impairments either listed in or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4 (20 CFR 416.925 and 416.926).

4. The claimant was not under a "disability" as defined in the Social Security Act, at any time prior to the attainment of age eighteen (20 CFR 416.923).

5. The claimant's testimony and demeanor at the hearing regarding the extent of his pain and functional limitation was found to be completely credible and convincing.

6. The claimant has the residual functional capacity to perform physical exertion and nonexertional requirements of work except for lifting twenty pounds on an occasional basis with both hands, lifting more than five pounds on an occassional [sic] basis with the right hand, standing and/or walking more than six hours out of an eight hour day; asks requiring good grip strength or dexterity of the right

hand; or working in environments with background noise or a large degree of telephone usage (20 CFR 416.945).

7. The claimant has no past relevant work experience.

8. The claimant's functional capacity for the full range of light work is reduced by nonexertional limitations (hearing impairment and deformity of the right hand).

9. The claimant is twenty years old, which is defined as a younger individual (20 CFR 416.963).

10. The claimant has a high school education (20 CFR 416.964).

11. The claimant does not have any acquired work skills which are transferrable [sic] to the skilled or semi-skilled work activities of other work (20 CFR 416.968).

12. Based on an exertional capacity for light work, and the claimant's age, education, and lack of work experience, Section 416.969 of Regulations No. 16 and Rule 202.20, Table No. 2, Appendix 2, Subpart P, Regulations No. 4 would direct a conclusion of "not disabled".

13. Considering the claimant's additional nonexertional limitations within the framework of the above-cited rule, he cannot be expected to make a vocational adjustment to work which exists in significant numbers in the national economy.

14. The claimant has been under a "disability" as defined in the Social Security Act, since April 15, 1986, the date he attained age eighteen (20 CFR 416.920(f)).

DECISION

It is the decision of the Administrative Law Judge that, as of the date the claimant attained age eighteen, April 15, 1986, the claimant was "disabled" under Section 1614(a)(3)(A) of the Social Security Act, and that the claimant's disability has continued through at least the date of this decision.

The component of the Social Security Administration responsible for authorizing supplemental security income payments will advise the claimant regarding the non-disability requirements for these payments, and if eligible, the amount and month(s) for which payment will be made.

RICHARD B. PAYNTER
Administrative Law Judge

December 27, 1988
Date

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF:	CLAIM FOR:
Leon C. Gabel (Claimant)	Child's Insurance Benefits (Disability and Supplemental Security Income (Child)
Leon N. Gabel (Wage Earner)	OMITTED (Claimant) OMITTED (Wage Earner) (Social Security Number)

PROCEDURAL HISTORY

The claimant's mother, Monica Gabel, filed an application for child's supplemental security income benefits on the claimant's behalf. This claim was denied through the hearing level. After a review by the Appeals Council the prior denial was vacated and the undersigned was instructed to issue a new decision.

Pursuant to the Appeal's Council directive, a psychological examination, psychiatric examination and neurological examination were scheduled. The reports of these examinations were proffered to the claimant's representative and entered into the record. Additionally, a hearing was held at which time the undersigned obtained testimony from Paul Salamone, an independent vocational expert. Additional evidence was also received from the claimant's representative and entered into the record.

The claimant's mother also filed an application for disabled adult child's benefits on July 2, 1987. The claimant attained the age of 18 on November 28, 1987.

This is escalated to the hearing level and I am issuing a decision on both the application for child's supplemental security income and also the application for disabled adult child's benefits.

ISSUES

The issue before the Administrative Law Judge is whether the claimant is disabled under Section 1614(a)(3)(A) of the Social Security Act. The Act defines "disability" as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months or, in the case of a child under the age of 18, if he or she suffers from any medically determinable impairment of comparable severity.

An additional issue is whether the claimant is entitled to child's insurance benefits (disability) under Section 202(d) of the Social Security Act, as amended. The specific issue is whether the claimant is under a "disability," as defined in Section 223(d) of the Act, which began prior to the date the claimant attained age 22.

APPLICABLE REGULATIONS AND EVALUATION OF THE EVIDENCE

Pursuant to the Act, the Secretary has established Social Security Administration Regulations No. 16. Section 416.924 of the regulations provides that a child under age 18 is disabled if he or she (a) is not doing any substantial gainful activity; and (b) has medically determinable physical or mental impairment(s) which compare(s) in severity to any impairment(s) which would make an adult (a person age 18 or over) disabled. This requirement will be met when the impairment(s) –

(1) Meets the duration requirement; and

(2) Is listed in Appendix 1 of Subpart P of Regulations No. 4; or

(3) Is determined to be medically equal to an impairment listed in Appendix 1 of Subpart P of Regulations No. 4.

The Listing of Impairments describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity. The Listing of Impairments consists of Parts A and B. In evaluating disability for a person under age 18, Part B will be used first. If the medical criteria in Part B do not apply, then the medical criteria in Part A will be used.

Pursuant to the Act, the Secretary has established Social Security Administration Regulations No. 4. The regulations provide steps for evaluating disability (20 CFR 404.1520(a)). In addition, a claimant's impairment must meet the 12-month duration requirement before being found disabling. A set order is followed to determine whether an individual is disabled. *If it is determined that a claimant is or is not disabled at any point in the review, further review is not necessary.*

Social Security Administration Regulations No. 4 requires the Administrative Law Judge to consider the following in sequence:

1. An individual who is working and engaging in substantial gainful activity will not be found to be "disabled" regardless of medical findings (20 CFR 404.1520(b));

2. An individual who does not have a "severe impairment" will not be found to be "disabled" (20 CFR 404.1520(c));

3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and which "meets or equals a listed impairment in Appendix 1," Part A or Part B,

of Subpart P of Regulations No. 4, a finding of "disabled" will be made without consideration of vocational factors (20 CFR 404.1520(d));

4. If an individual has worked and is capable of performing work he or she has done in the past, a finding of "not disabled" must be made (20 CFR 404.1520(e));

5. If an individual's impairment is so severe as to preclude the performance of past work, other factors including age, education, past work experience and residual functional capacity must be considered to determine if other work can be performed (20 CFR 404.1520(f)).

The rules set out in Appendix 2 of Subpart P of Regulations No. 4 will be considered in determining whether a claimant with exertional impairments is or is not disabled. The regulations also provide that if an individual suffers from a nonexertional impairment as well as an exertional impairment, both are considered in determining residual functional capacity (20 CFR 404.1545). The rules established in Appendix 2 are then used as a framework in evaluating "disability," if a finding of disabled cannot be made based on strength limitations alone. In cases where the individual has solely a nonexertional type of impairment, determination as to whether disability exists shall be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in Appendix 2.

DECISION

The evidence of record fails to demonstrate that the claimant's impairments considered singly or in combination meet or equal the Listing of Impairments. Therefore it is concluded that the claimant does not meet the

standards for eligibility for child's supplemental security income benefits.

The evidence demonstrates that there are no jobs existing in significant numbers which the claimant can perform. Therefore he is eligible for disabled adult child's benefits.

RATIONALE

In order for a child to be determined under a disability under Title XVI, his impairment must be listed in the Listing of Impairments of Appendix 1, Subpart P of Regulations No. 4 or singly or in combination must be the equivalent of a listed impairment. Generally speaking, the Listing of Impairments is a detailed listing divided by body systems into sections of specific diseases and abnormalities in prescribing types of test results and other data required to support a finding of "disability".

Listing 112.05 requires that the claimant have an I.Q. of 60 to 69 inclusive, and physical or other mental impairment imposing additional and significant restriction of function or development progression.

Psychological testing in September 1983 when the claimant was 13 years old demonstrated a Verbal I.Q. score of 78, a Performance I.Q. score of 71 and a Full-Scale I.Q. score of 72 (Exhibit 11).

Testing on June 2, 1986 when the claimant was 16 years of age, showed a Verbal I.Q. score of 69, a Performance I.Q. score of 78 and a Full-Scale I.Q. score of 72. He functioned in the upper area of the educable mentally retarded range (Exhibit 11).

The psychological testing requested by the Appeals Council directive was performed on August 9, 1988 by psychologist Richard Pearson. This demonstrated a Verbal I.Q. score of 76, a Performance I.Q. score of 81 and a Full-Scale I.Q. score of 77. His overall conclusion was that the claimant would be a candidate for a carefully

managed work setting, appropriate to his limited intellectual resources (Exhibit 22).

In the opinion of consulting psychiatrist, Sherwin Radin, M.D., the claimant's mental retardation/borderline intelligence would make it difficult for him to work in many settings but he ". . . should be able to do some kind of work" (Exhibit 23).

The evidence fails to establish conclusively a history of impaired intellectual functioning below that (I.Q. of 69 or less) prescribed by the Listings. Dr. Monreal found no additional significantly limiting neurological deficits (Exhibit 25). Dr. Radin concluded that the claimant's psychological condition would make it difficult, but not impossible, to perform work activity (Exhibit 23), a conclusion which is not rebutted by psychologist Person's testing (Exhibit 22).

Since the evidence of record failed to demonstrate that the claimant's condition meets or equals the Listing of Impairments, the undersigned concludes that the claimant does not meet the standards for eligibility for child's supplemental security income benefits within the meaning of Title XVI of the Social Security Act.

Since it is concluded that the claimant's condition does not meet or equal in severity the requirements of the Listings, in order for the claimant to be found eligible for disabled adult child's insurance benefits under Title II of the Act, the evidence must show that the claimant is unable to perform his past relevant work or any other substantial gainful activity. The claimant has no past relevant work experience. Hence, the issue before the undersigned is whether there are jobs existing in significant numbers which a person such as the claimant can perform.

In order to develop the record more fully an independent vocational expert, Dr. Paul Salamone, was asked to testify whether a person such as the claimant could engage in any substantial gainful activity. His testimony indicated that the claimant has the following

adverse vocational factors: limited social awareness, limited social ability, poor ability to deal with stress, a history of seizures and impaired intellectual capacity. In his opinion it was unlikely that such a person could function in any job.

In view of the claimant's history of defective intellectual development since September 1, 1983 (Exhibit 11, page 4), the opinion of psychologist Merick, the side effects of his seizure medication (sluggishness, blurred vision and uncontrolled bowel movements), the claimant's limited social ability and his impaired ability to deal with stress, it is concluded that he has been precluded from performing any substantial gainful activity. It is concluded that he is entitled to child's insurance benefits (disability) under Section 202(d) of the Social Security Act.

There is evidence to suggest that with rehabilitative efforts Mr. Gabel can be trained to work and he is encouraged to avail himself of the opportunity to do so.

Because of his young age and potential for rehabilitation, his continued entitlement to benefits should be periodically reviewed.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant is the child of the wage earner, Leon C. [sic] Gabel.

2. The claimant was unmarried at the time that his application for disabled adult child's insurance benefits was filed and is still unmarried.

3. The claimant was dependent on the wage earner.

4. The claimant attained the age of 18 on November 28, 1987.

5. The claimant has never engaged in substantial gainful activity.

6. The claimant has the following impairments: borderline intellectual functioning, a seizure disorder (In control with medication).

7. The claimant has no past relevant work experience.

8. The medical evidence establishes that the claimant does not have an impairment or combination of impairments listed in or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

9. There are no jobs existing in significant numbers which a person such as the claimant could perform.

10. The claimant has been under a "disability" as defined in the Social Security Act, since September 1, 1983 which is prior to the date the claimant will attain the age of 22.

DECISION

It is the decision of the undersigned Administrative Law Judge that, based on the application filed on December 2, 1988, the claimant is not eligible for supplemental security income under Section 1602 and 1614(a)(3)(A) of the Social Security Act.

It is the decision of the Administrative Law Judge that, based on the application filed on July 2, 1987, the claimant is entitled to child's insurance benefits (disability) under Sections 202(d) of the Social Security Act.

Joachim J. Volhard
Administrative Law Judge
Office of Hearings and Appeals
Suite 400, The Chambers
351 South Warren Street
Syracuse, New York 13202-2056

Dated: November 28, 1988

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNCIL

IN THE CASE OF:

Leon C. Gable
(Claimant)

CLAIM FOR:
Supplemental Security Income (Child) and Supplemental Security Income

OMITTED
(Social Security Number)

(Wage Earner)
(Leave blank if same as above)

This case is before the Appeals Council on the claimant's request for review of the Administrative Law Judge's decision dated November 28, 1988, as it pertained to the claimant's child's supplemental security income claim. By letter dated May 31, 1989, the claimant and his representative were advised that the Appeals Council had granted his request for review and proposed, absent new and material evidence or legal argument to the contrary, to issue a decision finding him "not disabled" with respect to the child's supplemental security income claim, but, "disabled" under section 1614(a)(3)(A) of the Social Security Act.

The Appeals Council has considered the entire record which was before the Administrative Law Judge. The Appeals Council's notice of review has been entered into the record as Exhibit AC-1. There has been no response to this notice received from the claimant and/or his representative.

The Administrative Law Judge's statements as to the pertinent provisions of the Social Security Act, the issues in the case, and the evidentiary facts are incorporated herein by reference.

On November 28, 1988, the Administrative Law Judge issued a decision finding the claimant "disabled" with respect to his claim for disabled child's benefits. The decision found the claimant did not meet the standards for eligibility for child's supplemental Security income benefits. It was this portion of the Administrative Law Judge's decision that the claimant requested Appeals Council review.

With regard to child's supplemental security income benefits, if the claimant is under age 18, we will consider him disabled if he is suffering from any medically determinable physical or mental impairment(s) which compares in severity to an impairment that would make an adult (a person age 18 or over) disabled. This requirement will be met when the impairment(s) –

(1) Meets the duration requirement; and

(2) Is listed in Appendix 1 of Subpart P of Part 404; or

(3) Is determined by us to be medically equal to an impairment listed in Appendix 1 of Subpart P of Part 404 (20 CFR 416.924).

The Administrative Law Judge in his decision found the claimant did not have an impairment(s) which met these requirements. After a careful review of all the evidence of record, the Appeals Council concurs with the Administrative Law Judge on this finding.

Once a person reaches the age of 18, the standard used to define disability changes. Now, the law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment(s) which can be expected to result in death or which has lasted or can be expected to last for a continous period of not less than 12 months (20 CFR 416.905). This is the same standard used by the

Administrative Law Judge in finding the claimant disabled with respect to his claim for disabled adult child's benefits.

On November 28, 1987, the claimant attained the age of 18. Therefore, at that time, the issue of disability was the same as had already been decided under a different title of the Act. When this happens, the issue will not be considered again, but we will accept the factual finding made in the previous decision unless there are reasons to believe it was wrong (20 CFR 416.1450(f)).

In view of the above, the Appeals Council finds that prior to the claimant's attainment of age 18, he was not eligible for child's supplemental security income. However, as of November 28, 1987, the Appeals Council finds the claimant "disabled" under section 1614(a)(3)(A) of the Social Security Act.

DECISON

It is the decision of the Appeals Council that, based on the application filed on December 2, 1986, the claimant is not eligible for child's supplemental security income benefits under sections 1602 and 1614(a)(2)(A) of the Social Security Act.

It is the decision of the Appeals Council that, as of November 28, 1987, the claimant has been disabled under section 1614(a)(3)(A) of the Social Security Act.

The component of the Social Security Administration responsible for authorizing supplemental security income payments will advise the claimant regarding the nondisability requirements and, if eligible, the amount and the month(s) for which payment will be made.

APPEALS COUNCIL

Bernard A. Dowgiello, Member

Larry K. Banks, Member

Date: August 3, 1989